FOR ARGUMENT

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No. 01-1862 (9)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

JEANNE WOODFORD, Petitioner,

v.

ROBERT FREDERICK GARCEAU, Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

In 1994, this Court held in *McFarland v. Scott*, 512 U.S. 849, that a capital habeas corpus proceeding is "pending" in federal court, for purposes of the stay provisions of 28 U.S.C. § 2251, after the filing of a motion for appointment of counsel and before the filing of a formal habeas petition or application. In 1996, Congress specifically used the phrase "case pending" in the key retroactivity provision of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), rather than "petition" or "application," which were predominantly used in other parts of the statute. When a habeas petitioner under sentence of death initiated federal proceedings by filing a motion for the appointment of counsel and for a stay of execution, and filed a pleading required by local district court rules which identified exhausted colorable federal claims to justify a further stay of execution, all prior to the enactment of AEDPA, did he have a "case pending" so that Chapter 153 of AEDPA does not apply?

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RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Garceau was convicted of two murders in Kern County, California, and was sentenced to death. On direct appeal, the California Supreme Court affirmed his conviction and sentence. Pet. App. 102-179 (*People v. Garceau*, 6 Cal.4th 140, 24 Cal.Rptr.2d 664, 862 P.2d 664 (1993)). The Court held, *inter alia*, that any due process violation based on an erroneous instruction which told the jury that it could consider evidence of defendant's other crimes for "any purpose," including his criminal propensity, was harmless. Pet. App. 141-142. This Court denied certiorari review on October 3, 1994. *Garceau v. California*, 513 U.S. 848 (1994).

On May 12, 1995, Garceau filed a request for appointment of counsel and for a stay of execution in U.S. District Court, Eastern District of California. Resp. App. 203-210. The district

court issued a 45-day stay of execution on the same day. Resp. App. 199-202. Counsel was appointed on June 26, 1995, and the district court extended the stay of execution for 120 days.[1] Resp. App. 211-214. On August 1, 1995, the State filed a noticed motion to vacate the stay of execution, which contended that: 1) the stay was not justified because appointed counsel were not new to the case and 2) the stay application provided only a conclusory statement that counsel believed there were meritorious federal constitutional claims rather than a specification of nonfrivolous issues as required by local rules. Resp. App. 215-224. On August 14, 1995, Garceau filed an opposition to the motion to vacate, as well as a pleading entitled "Specification of Nonfrivolous Issues," which identified exhausted colorable federal constitutional claims. Resp. App. 225-233. On October 13, 1995, after a hearing, the district court denied the State's motion to vacate the stay of execution. The court also ordered that the petition be filed within nine months. Resp. App. 239-241. Garceau filed his initial funds request on November 17, 1995, and a case budget on November 27, 1995. Resp. App. 242-244. As ordered by the district court, on July 2, 1996, Garceau filed his federal habeas petition which consisted of twenty-four fully exhausted claims, and two other claims as to which the failure to exhaust was excused. Pet. App. 31; Joint App. 4.

On July 30, 1999, the district court issued an order denying the habeas corpus petition. Pet. App. 30-101. The Court of Appeals reversed, finding that the due process violation stemming from the propensity instruction was prejudicial under *Brecht v. Abrahamson*, 507 U.S.

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[1] In its Order Appointing Counsel and Temporary Stay of Execution, the district court referred to Garceau's request for counsel and stay of execution as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, and referred to the subsequent petition which would be filed on the merits as an amended petition. Resp. App. 211-212.

619 (1993). The case was reversed and remanded to the district court with instructions to issue the writ of habeas corpus. Pet. App. 1-26 (*Garceau v. Woodford*, 275 F.3d 769 (9th Cir. 2001)).

The case was not litigated under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Amended Chapter 153 of AEDPA does not apply to cases that were pending when AEDPA was enacted on April 24, 1996. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Garceau's case was a "case pending" because his case "had been filed" before the "date of the Act" when he filed a motion for the appointment of counsel and for a stay of execution in May 1995. *Id.* at 327; *see Calderon v. United States District Court (Kelly)*, 163 F.3d 530, 539 (9th Cir. 1998)(en banc), *cert. denied*, 526 U.S. 1060 (1999); *Garceau v. Woodford*, 275 F.3d at 772, n. 1.

SUMMARY OF ARGUMENT

AEDPA amended the habeas corpus provisions of Chapter 153 of Title 28 of the U.S. Code, and added a new set of provisions to expedite capital habeas corpus proceedings – Chapter 154. Section 107(c) of AEDPA expressly provides that Chapter 154 can be applied retroactively to all capital habeas corpus cases – to "cases pending on or after the date of enactment." Chapter 154 only applies, however, in jurisdictions which have met certain statutory requirements. California is not one of them. *Ashmus v. Woodford*, 202 F.3d 1160, 1165 (amended opinion), *cert. denied*, 531 U.S. 916 (2000). Amended Chapter 153 (hereinafter "Chapter 153" for ease of reference), on the other hand, is not retroactive. As this Court held, the "negative implication of section 107(c)" is that Chapter 153 does not apply to "cases pending" prior to the date AEDPA became effective. *Lindh v. Murphy*, 521 U.S. 320, 327, 336 (1997).

The issue before this Court is whether Chapter 153 applies to the finite group of habeas

petitioners, such as Garceau, who initiated habeas corpus proceedings in federal court prior to AEDPA's effective date but subsequently filed a formal petition. The State contends that based on the "plain meaning" of the term "pending" in § 107(c), a formal habeas petition must have been filed for a case not to be subject to Chapter 153's provisions. This analysis is flawed because it fails to take into account either the language of the statute as a whole or the legal backdrop against which Congress enacted the provision in question. An examination of both clearly demonstrates Congress's intent.

Congress often used the term "petition" or its synonym "application" throughout AEDPA, but it did not use these terms in section 107(c), opting for the broader phrase "case pending." Accordingly, Chapter 154, when applicable, is retroactive to all "cases pending" in federal court, not only to those cases in which a petition has been filed. Had Congress intended for "cases pending" to mean something different in the context of Chapter 153 – namely, only federal proceedings in which a formal petition had been filed prior to AEDPA's enactment – it would have been more explicit.

Moreover, when viewed in the context of this Court's then-recent decision in *McFarland v. Scott*, 512 U.S. 849 (1994), it becomes clear that Congress deliberately chose a term that would encompass a wider range of proceedings than the filing of a formal petition. In *McFarland*, this Court reversed the Fifth Circuit's holding that the filing of a habeas corpus petition was required to commence federal proceedings in a capital case in order to entitle the petitioner to habeas counsel under 21 U.S.C. § 848(q)(4)(B) and a stay of execution under 28 U.S.C. § 2251. This Court held that a "'post-conviction proceeding' ... is commenced by the filing of a death row defendant's motion requesting the appointment of counsel." *Id.* at 856-857.

Congress is presumed to be and certainly was aware that *McFarland* construed the above-cited statutes not to require the filing of a petition for a case to be considered pending. Given this awareness, had Congress intended that a formal petition be the critical pleading that commenced proceedings and created the dividing line for retroactive application of Chapter 153, it would have used the term "petition" or "application" rather than the phrase "case pending" in section 107(c).

That a petition is not a necessary prerequisite for a habeas proceeding to constitute a pending "case" is confirmed by *Hohn v. United States*, 524 U.S. 236 (1998). In *Hohn*, this Court held that an application for a certificate of appealability ("COA") constituted a "case" sufficient to give this Court jurisdiction to review the appellate court's denial of the COA under 28 U.S.C. § 1254. *Hohn* rejected the facile distinction urged here by the State between preliminary filings and challenges to the merits in determining the meaning of the term "case." Rather, as this Court emphasized, the proper analysis in determining whether a proceeding constituted a case is to look at whether there is adversity and other requisite qualities of a "case," including whether it requires a ruling that is judicial in nature. *Id.* at 241, 245, 249.

Garceau's federal habeas proceedings which pre-dated AEDPA had these attributes of a case, as well as those that the State contends can only be satisfied through the filing of a formal petition, such as notice of claims and providing the court with the opportunity to dispose of frivolous petitions. Garceau initiated federal proceedings by filing a motion for the appointment of counsel and a stay of execution, which were granted. The State moved to vacate an extension of the stay which had been granted to permit counsel time to prepare a habeas petition. The State's motion argued, *inter alia*, that Garceau had failed to justify the stay as required by local

rules by identifying nonfrivolous claims that would be presented in a federal petition. Garceau subsequently filed a Specification of Nonfrivolous Issues, which identified exhausted, colorable federal constitutional claims. The district court denied the State's motion to vacate the stay, implicitly finding the presence of nonfrivolous claims of federal constitutional error.

Clearly, the State had ample notice of Garceau's federal claims not only by virtue of the specification of issues, but due to the rules of exhaustion and procedural default, which required that Garceau's claims had to have been raised previously in state court post-conviction proceedings. There was also the potential for adversity as exemplified by the contested proceedings. Moreover, under the local rules, the district court was required to determine before extending the pre-petition stay that Garceau had at least one nonfrivolous federal claim – a ruling that was unquestionably judicial in nature and which could have disposed of the case if the stay were denied. In light of the nature and extent of these pre-petition proceedings, the State's contention that Garceau did not have a case pending prior to the enactment of AEDPA cannot be reconciled with Congressional intent as discerned from the language of AEDPA, the legal context in which it was enacted, and this Court's subsequent precedent.

Finally, while the State's petition for writ of certiorari was limited to the question discussed above regarding the applicability of Chapter 153 of AEPDA, it attempts in its Brief on the Merits to obtain from this Court a determination of Garceau's due process claim upon which the court below granted relief under a pre-AEDPA standard of review. This question is factually and legally distinct from the question upon which review was granted, and the State's belated attempt to insert it violates this Court's Rule 14.1(a).

ARGUMENT

I.

THE LANGUAGE OF AEDPA AND THE LEGAL CONTEXT IN WHICH IT WAS ENACTED DEMONSTRATE THAT THE "CASES PENDING" LANGUAGE GOVERNING RETROACTIVITY WAS NOT INTENDED TO REFER SOLELY TO HABEAS "PETITIONS" OR "APPLICATIONS" BUT WAS MEANT TO ENCOMPASS FILINGS RECOGNIZED AS INITIATING FEDERAL HABEAS PROCEEDINGS

A. The State Relies On An Interpretation of the Term "Pending" Based on "Plain Language" That Has No Relevance to the Intent of Congress

AEDPA made essentially two sets of changes to federal habeas corpus proceedings. First, it amended several provisions of the pre-existing habeas corpus statutes, i.e., those in Chapter 153 of Title 28 of the United States Code. Second, it added an entirely new chapter to Title 28 – Chapter 154 – containing new expedited provisions that apply only to capital habeas cases arising out of states that have satisfied certain pre-conditions.[2]

In *Lindh v. Murphy*, 521 U.S. 320, this Court determined that the provisions of Chapter 153 did not apply to "cases pending" at the time of AEDPA's enactment. *Id.* at 323. The analysis in *Lindh* focused on the intent of Congress as revealed through the statutory language. *Id.* at 326. As this Court explained, § 107(c) of AEDPA expressly applied Chapter 154 to "cases pending on or after the date of enactment" while there was no such provision for Chapter 153 cases. *Id.* at 327. The Court read "this provision of § 107(c) ... as indicating implicitly that the amendments to Chapter 153 were assumed and meant to apply to the general run of habeas cases

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[2] California's death penalty scheme does not comply with the requirements of Chapter 154 and, therefore, the state cannot avail itself of the procedural advantages of that Chapter. *Ashmus v. Woodford*, 202 F.3d at 1165. As the State concedes, the only issue before this Court is whether or not the provisions of Chapter 153 apply to Garceau's case. *Woodford v. Garceau*, 123 S. Ct. 32 (2002); Pet. Brief, at 4-5, n.1.

only when those cases had been filed after the date of the Act." *Id.* Thus, the Court concluded. "the negative implication of § 107(c) is that the new provisions of chapter 153 generally apply only to cases filed after the Act became effective." *Id.* at 336.

The question now before the Court is what Congress meant by the term "case pending." As in *Lindh*, Congress's intent must be discerned from the language of the statute itself, as well as from the legal context in which the statute was enacted. *See McFarland v. Scott*, 512 U.S. at 854-856 (Court construed the meaning of "post conviction proceeding" in 21 U.S.C. § 848(q)(4)(B) and 28 U.S.C. § 2251 in light of the statute's related provisions and the "legal backdrop" against which Congress enacted the provisions in question); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990)("we assume that Congress is aware of existing law when it passes legislation"); *McCarthy v. Bronson*, 500 U.S. 136, 140 (1991) ("We certainly presume that . . . when Congress selected this language, our elected representatives were familiar with our recently announced opinions"); *and see Traynor v. Turnage*, 485 U.S. 535, 546 (1988), and authorities cited.

According to the State, a habeas corpus petition which fully complies with the pleading requirements of 28 U.S.C. § 2242 and Rule 2 of the Rules Governing § 2254 Cases must have been filed prior to AEDPA's enactment in order for a case to be pending (and thus not subject to AEDPA's Chapter 153 provisions). The State derives this interpretation from what it refers to as the "plain meaning" of the term "pending" in § 107(c), which it contends necessarily means a "petition" or "application" pending. Pet. Brief, at 10-11. However, Congress did not use the term "petition pending" or "petition filed" in § 107(c) even though it used the term "petition" or

the synonymous term "application" throughout AEDPA.[3] The State fails to explain why, if Congress intended that Chapter 153 of AEDPA apply to habeas cases unless there was a "petition filed" it did not simply use the term "petitions filed" or "applications filed" rather than the broader term "case pending."[4]

Section 107(c) expressly makes Chapter 154 applicable, where the state has met the statutory requirements, to all capital "cases pending on or after the date of enactment." *Lindh v. Murphy*, 521 U.S. at 327. The State certainly would not argue that the ordinary meaning of "case pending" in this context is "petition filed," rather than any capital habeas proceeding in federal court that was still pending – whether or not a petition had been filed. For example, a habeas petitioner in a Chapter 154 jurisdiction obviously would have a "case pending" and therefore be subject to Chapter 154's expedited procedures for filing a habeas petition, *see* 28 U.S.C. § 2263(a)(a habeas petition be filed within 180 days after the case becomes final on direct

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[3] In AEDPA, Congress normally used the word "application" to refer to a habeas corpus "petition." *See, e.g.*, 28 U.S.C. §§ 2244(b) & (d) [16 occurrences of "application"], 2254 [4 occurrences], 2262(b) & (c) [2 occurrences], 2263 [3 occurrences], 2266 [17 occurrences], Rule 22 [5 occurrences]. Congress referred to a habeas corpus "petition" three times. *See, e.g.*, 28 U.S.C. §§ 2262(b)(3), 2263(b)(2), 2264(a).

[4] References in AEDPA to a federal habeas corpus "case" occur less than one-third as often as "application" and "petition" and plainly were intended to encompass more than these two terms connote. That the terms "cases" and "applications" or "petitions" are not synonymous is confirmed by the fact that they have obviously different meanings in the four places in AEDPA where they are directly juxtaposed. *See* 28 U.S.C. section 2262(c) (limiting a habeas court's "authority to enter a stay of execution in the *case* unless the court of appeals approves the filing of a second or successive *application*" (emphasis added)); section 2266(b)(1)(A) (setting a time limit for a district court (in a proceeding governed by Chapter 154) to decide "any *application* for a writ of habeas corpus brought under this chapter in a capital *case*"); 2266(c)(1)(A) (an "application" brought in a capital "case"); and 2263(b)(3)(A) (authorizing the Chapter 154 statute of limitations to be tolled when permitted by the district court that would have jurisdiction over the "case" upon the filing of a habeas corpus "application").

appeal) prior to filing the petition. Thus, while Chapter 154, when applicable, includes cases where petitions were in fact filed "on or after the date of enactment," it presumably also encompasses federal habeas proceedings initiated prior to AEDPA's enactment in which a petition had yet to be filed (as well as cases in which the petition was filed before AEDPA's enactment).

As noted above, this Court found in *Lindh*, that the negative implication of § 107(c) is that habeas cases that were pending when AEDPA was enacted are not subject to Chapter 153. *Lindh v. Murphy*, 521 U.S. at 336. It is apparent that if "case pending" for purposes of Chapter 154 does not refer only to cases where there have been petitions filed, then the exact same provision in the context of Chapter 153 would not refer only to cases where there have been petitions filed. In other words, since a petitioner who initiates federal proceedings but has not filed a petition in a Chapter 154 jurisdiction has a "case pending," such a petitioner under Chapter 153 also has a case pending. As *Lindh* holds, Chapter 154 would be retroactive in such a circumstance but Chapter 153 would not be.[5] *Id.* at 327.

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[5] In examining the "ordinary meaning" of the word "pending" in other aspects of AEDPA, it is clear that it does not simply refer to "petition" pending. As discussed below, under the stay provision of 28 U.S.C. § 2251, which was left intact by Congress when it amended Chapter 153, a "proceeding ... pending" does not require a petition to be filed. *McFarland v. Scott*, 512 U.S. at 856-857. This Court also rejected the notion that "pending" referred to the period of time that the petition itself, albeit a petition for state collateral review, was under court consideration. *Carey v. Saffold*, __ U.S. __, 122 S. Ct. 2134, 2138 (2002). In that case, it was determined that under 28 U.S.C. § 2244(d)(2), which tolls the one year statute of limitations during the time an application for state collateral review is pending, the statutory term "pending" included intervals between the lower court determinations of a state petition and the filing of another petition in a higher court. *Id.* at 2140. Thus, "pending," even as in section 2244(d)(2), which explicitly refers to an "application" pending rather than to a "case" pending, does not require that a petition or application be filed. In addition, we know from this Court's decision in *Slack v. McDaniel*, 529 U.S. 473 (2000), that an application of a certificate of appealability pursuant to 28 U.S.C. § 2253(c) can also constitute a "pending" case for purposes of applying AEDPA.

It becomes even more clear that the use of the phrase "case pending" in § 107(c) rather than "petition" or "application" must have been deliberate and meaningful on Congress's part when AEDPA is viewed in the context of this Court's 1994 decision in *McFarland v. Scott*, 512 U.S. 849. In *McFarland*, this Court considered a closely related question regarding when a habeas corpus case could be deemed pending under two statutory provisions: 21 U.S.C. § 848(q)(4)(B), which creates the right to counsel for capital defendants in federal habeas corpus proceedings, and 28 U.S.C. § 2251, which gives a federal judge before whom a "habeas corpus proceeding is pending" the power to grant a stay of execution. The lower court held that because no habeas petition had been filed, no "post conviction proceedings" had been initiated, and therefore McFarland was not entitled to the appointment of counsel and the court lacked jurisdiction to enter a stay of execution. *Id.* at 853.

This Court rejected this interpretation of a pending habeas proceeding, concluding that a "'post-conviction proceeding' ... is commenced by the filing of a death row defendant's motion requesting the appointment of counsel," thus entitling a petitioner to counsel prior to the filing of a habeas petition. *Id.* at 856-857. In addition, once a request for counsel has been filed in a capital habeas case, this Court held, the case is "pending" despite the absence of a formal habeas petition, thus permitting a stay of execution under 28 U.S.C. § 2251. *Id.* at 856-857.

Congress is presumed to have been thoroughly aware of this Court's holding in *McFarland* that a federal habeas corpus proceeding in capital cases is commenced not by the filing of a "petition" but by the filing of a motion for the appointment of counsel. *See, e.g.*,

McCarthy v. Bronson, 500 U.S. at 140-142.[6] Indeed, during the debate of a version of AEDPA which was passed in the Senate but not the House, in which a proposed amendment to 21 U.S.C. § 848(q)(4)(B) was rejected, the *McFarland* case was specifically cited. *See* 141 Cong.Rec. S7813 (June 7, 1995).[7]

Given *McFarland's* refusal to read the word "petition" or "application" into habeas statutes where these words did not appear, Congress would not have failed to use the word "petitions" or "applications" in section 107(c) of AEDPA if it had intended to limit section 107(c) to situations where a petition or application had been filed. And the failure to use "petition" or "application" in section 107(c) cannot be deemed to be an oversight or inadvertence, when those were the words used predominantly throughout the rest of AEDPA's habeas provisions.

The State cites to court of appeals cases which decline to find that the *McFarland* decision has any relevance to discerning the meaning of "case pending" in AEDPA. These cases

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[6] The *McFarland* decision was handed down June 30, 1994. Section 107(c) of AEDPA was first proposed in Congress on May 25, 1995. *See Lindh v. Murphy*, 521 U.S. at 330, n. 6.

[7] As initially proposed, AEDPA's habeas provisions would have amended § 848(q)(4)(B) by making the appointment of counsel discretionary rather than mandatory in capital habeas cases. *See* S. 735, 104th Cong., 1st Sess., § 608, 141 Cong.Rec. S7567 (May 25, 1995). Another provision in the Act proposed to make appointment of counsel discretionary in all habeas cases "[n]otwithstanding any other provision of law." *Id.*, §604(5), at S7565. However, when the import of the proposed amendment to § 848(q) was pointed out to the Act's authors during floor debates, the amendment was withdrawn, and the language making appointment of habeas counsel discretionary "notwithstanding any other provision of law" was reversed as to capital cases, so that habeas counsel would remain discretionary "*[e]xcept as provided in title 21, United States Code, section 848.*" *See* 141 Cong. Rec. S7812-17 (June 7, 1995) (emphasis added). With only a technical change, this language was enacted in the Act. *See* AEDPA § 104(d), enacting 28 U.S.C. § 2254(h) (the right to counsel in federal habeas cases is discretionary "[e]xcept as provided in section 408 of the Controlled Substances Act [21 U.S.C. § 848(q)]"). Thus, in passing AEDPA, Congress was not only aware of *McFarland*, but considered the primary statute upon which *McFarland* was based and expressly decided to keep it intact.

determined that the reach of *McFarland* was limited to giving effect to congressional intent with regard to two narrow statutory provisions. *See Williams v. Cain*, 125 F.3d 269, 274 (5th Cir. 1997) (*McFarland* was only intended to "resolve practical procedural problems" so that unrepresented, indigent defendants could obtain counsel under 21 U.S.C. § 848(q)); *Williams v. Coyle*, 167 F.3d 1036, 1039 (6th Cir. 1999)(*McFarland's* holding rested solely on the "necessity of expanding the ordinary meaning of a 'pending case' to give effect to clear congressional intent," relating to the statutes at issue).

Whether or not, as these cases conclude, *McFarland*'s rationale could support a *post hoc* judicial narrowing of its holding, *McFarland's* unmistakable ruling that a capital case commences upon the filing of a request for counsel provided the legal backdrop for Congress's 1996 decision to use the broad term "case" in § 107(c) rather than "petition" or "application." *See Square D Company v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 418-420 (1986). Congress's awareness of *McFarland* confirms what the overall language of AEDPA indicates: when Congress used the word "pending" in section 107(c) of AEDPA, Congress presumably intended the word to have the same connotation as it had just been held to embody in the habeas statutes so recently construed, i.e., that a habeas case could become "pending" even in the absence of a formally filed petition.

B. The State's Attempt to Analogize a Habeas Petition to a Civil Complaint for Purposes of Discerning the Meaning of "Case Pending" Is Misplaced

The State attempts to graft Rule 3 of the Federal Rules of Civil Procedure onto the habeas corpus rules. Fed.R.Civ.P. 3 provides that "[a] civil case is commenced by filing a complaint with the court." According to the State, Fed.R.Civ.P. 3 applies to habeas proceedings by virtue

of Rule 11 of the Rules Governing § 2254 Cases, which permits (but does not require) the Rules of Civil Procedure to be applied to habeas corpus proceedings when they are not inconsistent. The State argues that since there is no inconsistency between the habeas rules and Fed.R.Civ.P. 3, a petition commences a habeas case just as a complaint commences a civil case. Pet. Brief, at 11 (citing *Williams v. Coyle*, 167 F.3d at 1038).

There is no evidence that Congress had Fed.R.Civ.P. 3 in mind when it chose to use the words "case pending" in AEDPA's § 107(c) rather than "petitions filed" or "applications filed" or "complaint filed." Moreover, Rule 11 of the Rules Governing § 2254 Cases states that "[t]he federal Rules of Civil Procedure, to the extent they are not inconsistent with these rules, *may be applied*, when appropriate, to petitions filed under these rules." (Emphasis added). Thus, Rule 11 recognizes that Civil Rules do not necessarily control habeas corpus proceedings but merely *permit* resort to the Rules of Civil Procedure. Furthermore, the Advisory Committee Notes following Rule 11 indicate that, "[t]he court does not have to rigidly apply rules which would be inconsistent or inequitable in the overall framework of habeas corpus. Rule 11 merely recognizes and affirms their discretionary power to use their judgment in promoting the ends of justice." Rules Governing § 2254 Cases, Rule 11, advisory committee's note. Congress can hardly be expected to express its intent by way of a rule that on its very face does not require the courts to effectuate the supposed intent at all. In addition, Rule 11 only permits the Rules of Civil Procedures to be "applied ... to petitions." Rule 11. A rule of Civil Procedure that can only be applied to a petition does not logically shed any light on whether § 107(c) means a "petition" in the first place.

Reliance on Fed.R.Civ.P. 3 to define when a habeas proceeding commences is also at

odds with this Court's reasoning in *McFarland v. Scott*, which, as discussed above, held that capital habeas cases could be initiated *pre-petition* by the filing of a request for counsel. If Fed.R.Civ.P. 3 controls the meaning of "cases pending" in one statute (AEDPA, § 107(c)), it would presumably also control the meaning of the two statutes at issue in *McFarland* (21 U.S.C. § 848(q)(4)(B), 28 U.S.C. § 2251). Certainly, Congress could not have expected the courts to rely on Fed.R.Civ.P. 3 to divine statutory intent, when this Court rejected this very point with respect to two other habeas statutes, just two short years before AEDPA was passed. *See Square D Company v. Niagra Frontier Tariff Bureau, Inc.*, 476 U.S. at 419 (Congressional awareness of a court's construction of a statute and the fact that Congress specifically left it undisturbed lends powerful support to its continued viability).

C. The Backdrop Against Which Congress Enacted Section 107(c) Includes its Awareness of the Complexity of Capital Habeas Cases and the Liberal Construction of Pleadings Filed by Pro Se Litigants

While § 107(c) does not explicitly mention Chapter 153, this Court has held that Chapter 153 as well as Chapter 154 "had to have been in mind when § 107(c) was added" to AEDPA, and "[n]othing, indeed, but a different intent explains the different treatment." *Lindh v. Murphy*, 521 U.S. at 329. It is apparent that Congress intended for there to be retroactive application of AEDPA for Chapter 154 cases because a habeas petitioner in such a circumstance theoretically has had the benefits of competent and adequately compensated counsel in state post-conviction proceedings, *see* 28 U.S.C. § 2261, and therefore would be in a better position to comply with Chapter 154's expedited procedures. It is not surprising, however, that Congress determined that in jurisdictions where states had not complied with the statutory requirements of Chapter 154, capital habeas petitioners who were in the process of preparing comprehensive habeas petitions

at the time of AEDPA's enactment would not be subject to its new "standards affecting entitlement to relief." *Lindh v. Murphy*, 521 U.S. at 329. Congress had previously acknowledged, in enacting § 848(q), the uniqueness and complexity of capital habeas proceedings, as well as the importance of legal, investigative, and expert assistance in the preparation of the habeas petition. *See McFarland v. Scott*, 512 U.S. at 855-856. To apply new substantive rules mid-stream would be especially disruptive where these resources had been marshaled to prepare a federal habeas petition under pre-AEDPA law by petitioners who had not had the advantages in state court of those in Chapter 154 jurisdictions.

Of course, Chapter 153 applies not just to non-Chapter 154 capital cases, but also to the "general run of habeas cases." *Lindh v. Murphy*, 521 U.S. at 327. In addition to being mindful of *McFarland* and the duties of habeas counsel in capital cases when it enacted AEDPA, Congress was also certainly aware of the well-established, well-known feature of federal practice that pleadings filed *pro se* by indigent, legally untrained litigants were treated as sufficient to initiate a proceeding if they were filed within the applicable period of limitations and manifested an intention to seek judicial redress. The rule of *Haines v. Kerner*, 404 U.S. 519 (1972), was that such filings were held "to less stringent standards than formal pleadings drafted by lawyers" and were not to be turned away, however "inartfully pleaded." *Id.* at 520. Accord: *e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Boag v. MacDougall*, 454 U.S. 364, 365 (1982); *and see Neitzke v. Williams*, 490 U.S. 319, 330 (1989).[8] Specifically, when the question was whether a

[8] The rule was routinely applied in the courts of appeals. *See, e.g., Alley v. Dodge Hotel*, 501 F.2d 880, 883-886 (D.C. Cir. 1974); *Ayala Serrano v. Lebron Gonzales*, 909 F.2d 8, 12-13 (1st Cir. 1990); *Williams v. Kullman*, 722 F.2d 1048, 1050 (2d Cir. 1983); *Nichols v. United States*, 75 F.3d 1137, 1140-1141 (7th Cir.1996). As the Second Circuit explained in *Williams*, 722 F.2d at 1050:

> "due to the *pro se* petitioner's general lack of expertise, courts should review habeas petitions with a lenient eye, allowing borderline cases to proceed. *See* Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts, Tentative Report No. 2, Part IV, Section D at 57 (Federal Judicial Center, 1977). These views are wholly consistent with Supreme Court doctrine, which confirms that *pro se* complaints must be liberally construed, *Haines v. Kerner*, ... The justification for this policy is apparent. If the writ of habeas corpus is to continue to have meaningful purpose, it must be accessible not only to those with a strong legal background or the financial means to retain counsel, but also to the mass of uneducated, unrepresented prisoners."

filing had been made within a statute of limitations or other deadline, the federal practice was clearly settled that an unrepresented indigent litigant's papers would be regarded as timely filed even though they were formally insufficient, so long as they served to provide the kind of notice to the opposing party and the court that the deadline was designed to assure. *Smith v. Barry*, 502 U.S. 244, 248 (1992). *See, e.g., Bradley v. Coughlin*, 671 F.2d 686, 689-690 (2d Cir. 1982); *Hanlin v. Mitchelson*, 794 F. 2d 834, 836, 838-839 (2d. Cir. 1986); *Grune v. Coughlin*, 913 F.2d 41, 43 (2d Cir. 1990); *United States v. Young*, 966 F.2d 164, 165 (5th Cir. 1992); *Pearson v. Gatto*, 933 F.2d 521, 526-527 (7th Cir. 1991); *Listenbee v. City of Milwaukee*, 976 F.2d 348, 349-351 (7th Cir. 1992); *Ray v. Cowley*, 975 F.2d 1478, 1479 (10th Cir. 1992); *Hamilton v. Ford*, 969 F.2d 1006, 1010 n. 2 (11th Cir. 1992).

The teaching of *Smith v. Barry*, 502 U.S. 244, is that a formally deficient pleading will be treated as sufficient to meet a filing deadline if it is the "functional equivalent" of the kind of document that the pleading rules demand. *Id.* at 248. In the context of AEDPA's amendments to Chapter 153, the question of the sufficiency of a filing to commence a habeas corpus proceeding would have been expected by Congress to arise principally in connection with the enforcement of the one-year statute of limitations newly enacted by § 2244(d)(1). And the function of that statute, as of any statute of limitations, is to "put the adversary on notice to defend within the

period of limitation," *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944), and to bring the litigation within the power of the court to control its pace, so as to "spare the courts from litigation of stale claims." *Chase Securities v. Donaldson*, 325 U.S. 304, 314 (1945). *See, e.g., Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 428 (1965). For these purposes, the specificity of fact pleading and issue identification required of a habeas petition in order to bring it into compliance with the formal pleading rules of 28 U.S.C. § 2242 and Rule 2 of the § 2254 Rules has never been thought necessary. *See, e.g., New York Central & Hudson RiverR.R. Co. v. Kinney*, 260 U.S. 340, 346 (1922) (by Holmes, J.)[6]

Against this backdrop, the Congress that enacted the habeas provisions of AEDPA – which contained a statute of limitations that Congress must have known would be applied primarily to documents received by federal courts from unrepresented, legally unsophisticated prisoners – could not possibly have understood or intended that a document complying with the pleading requirements of 28 U.S.C. § 2242 and Rule 2 of the § 2254 Rules would be demanded in order to commence a "case."

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[6] This is why post-limitations amendments to complaints are permitted even though they add new claims or theories relating to the same basic factual situation that gave rise to a lawsuit filed within the limitations period. *See* FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE § 4.23, at p. 278 (5th ed. 2001). In any event, it is inconceivable that Garceau's *McFarland* motion failed to put the State on notice both of Garceau's intention to challenge his capital conviction and of the range of grounds on which he would challenge it. The likelihood that Garceau would *not* carry through on his manifest intention to obtain federal review of a death judgment once he was given counsel for this purpose was nil; and the rule of *Wainwright v. Sykes*, 433 U.S. 72 (1977), informed the State that Garceau's federal-court claims would be – and, in fact, were – those that had already been litigated between the parties in the state courts. No less than reviewing courts (*see Ross v. Moffit*, 417 U.S. 600, 614-615 (1974); *Pennsylvania v. Finley*, 481 U.S. 551, 557-558 (1987)), a habeas respondent can discern from previous proceedings in the same case the nature of the claims available to the petitioner.

D. *Lindh v. Murphy* Confirms That Congress Understood That the "Case Pending" Language of § 107(c) Would Not Be Equated with Petitions Filed

This Court's discussion in *Lindh* regarding 28 U.S.C. § 2254(h) further confirms Garceau's reading of § 107(c). As noted earlier, Congress made AEDPA's Chapter 154 revisions applicable to pending capital habeas cases arising out of states that have met specific conditions. It also made some (but not all) of the Chapter 153 amendments applicable to those cases. *See* 28 U.S.C. § 2264(b). Section 2254(h) is a provision dealing with the appointment of counsel in Chapter 153 which AEDPA did not incorporate into pending Chapter 154 proceedings. This Court in *Lindh* sought to explain why Congress would not make this newly enacted subdivision concerning counsel applicable to pending cases litigated under Chapter 154. The Court's explanation was that "[t]here was no need [for Congress] to make subsection (h) immediately available to *pending cases*, capital or not, because 21 U.S.C. § 848(q)(4)(B) already authorized appointment of counsel in *such [pending] cases*." *Lindh*, 521 U.S. at 336.

Given *McFarland*'s prior holding that § 848(q)(4)(B) authorizes the appointment of counsel "prior to the filing of a formal, legally sufficient habeas corpus petition" in a capital case, *McFarland v. Scott*, 512 U.S. at 854-855, the *Lindh* language confirms that capital cases in which counsel has been appointed "prior to the filing of a formal, legally sufficient habeas corpus petition" are "pending cases" within the meaning of AEDPA. Furthermore, the "proceeding ... pending" language of Chapter 153's stay provision, § 2251, cannot be meaningfully distinguished from the "cases pending" language of section 107(c), which as *Lindh* concluded, "implicitly" governs the applicability of "the amendments to chapter 153." *Lindh v. Murphy*, 521 U.S. at 326-27.

The language of the statute when considered in the context of *Lindh* and *McFarland* leads to the conclusion that a request for appointment of counsel, coupled with a motion for stay of execution, constitutes a "pending case." This is exemplified in Garceau's case, where not only were these pleadings filed, but after counsel was appointed and the stay was granted, the State moved to vacate an extension of the stay, which was denied after Garceau filed a notice of exhausted colorable federal constitutional claims to be presented. As discussed below, this pre-petition litigation had all the attributes of a "case."

II.

THE FILING OF A MOTION FOR THE APPOINTMENT OF FEDERAL HABEAS COUNSEL AND FOR A STAY OF EXECUTION, AND THE SUBSEQUENT FILING OF A PLEADING WHICH SETS FORTH COLORABLE EXHAUSTED FEDERAL CLAIMS CONSTITUTE A "PENDING CASE" SUCH THAT AMENDED CHAPTER 153 OF AEDPA CANNOT BE APPLIED RETROACTIVELY

In California, after a petitioner under sentence of death initiates federal proceedings by requesting counsel and a stay of execution, local rules and practice have created additional procedures which remove any doubt that there is a "case pending" prior to the filing of a formal habeas petition. For example, motions for the appointment of federal counsel and for pre-petition stays of execution can and have been contested. In addition, after habeas counsel's appointment, a subsequent pleading called a "Specification of Nonfrivolous Issues" must be filed, based on which the district court judge makes a preliminary merits determination to justify an extension of the stay of execution to permit preparation of the habeas petition.

Accordingly, Garceau engaged in pre-petition litigation, prior to AEDPA's enactment, which provided the State with notice of claims and included an assessment by the district court

that Garceau had at least one nonfrivolous federal constitutional claim. After counsel was appointed, and an extension of the original stay of execution was granted to permit preparation of the habeas petition, the State moved to vacate the stay. The State contended that newly appointed counsel had prior familiarity with the case, was not entitled to a pre-petition stay, and therefore was required to file a petition forthwith. The State also argued that counsel had provided only a conclusory statement that counsel believed there were meritorious federal constitutional claims rather than providing notice of specific claims as required by local rules. Resp. App. 220. Garceau subsequently filed a "Specification of Nonfrivolous Issues," which identified potential federal constitutional claims that were among the issues to be raised in a petition for writ of habeas corpus, and also filed a brief in opposition to the motion to vacate the stay. Resp. App. 225-233.

The "Specification of Nonfrivolous Issues," is a pleading required under the local rules for the U.S. District Court, Eastern District of California ("L.R.") which formalizes as a matter of standard procedure the identification of at least some colorable federal claim to warrant a further stay of execution.[10] The rule, entitled "Temporary Stay for Preparation of the Petition," provides as follows:

> . . . upon counsel's application for a temporary stay of execution accompanied by a specification of nonfrivolous issues to be raised in the petition, the Court shall issue a temporary stay of execution unless no nonfrivolous issues are presented.

L.R. 81-191(h)(3).

After a hearing, the district court denied the State's motion to vacate, and Garceau then

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[10] Such a pleading is required by the local rules of the other district courts in California as well. *See, e.g., Brown v. Vasquez*, 952 F.2d 1164, 1165 n.2 (9th Cir. 1992).

obtained a further stay of execution to permit the filing of the habeas petition within nine months. Resp. App. 239-241.

Garceau's filings to initiate federal proceedings, the State's opposition, and the district court's orders and rulings represent the kind of adversarial judicial proceedings that constitute a "case" under the reasoning of this Court's decisions in *Hohn v. United States*, 524 U.S. 236, and *Slack v. McDaniel*, 529 U.S. 473. *See also McFarland v. Scott*, 512 U.S. at 860-862 (O'Connor, J., concurring in part and dissenting in part)(suggesting that capital defendants must make a showing of the existence of at least some colorable federal claim before a stay of execution may be entered).[11]

In *Hohn*, this Court considered whether it had jurisdiction under 28 U.S.C. § 2253(c) to review decisions of the courts of appeals which denied applications for certificates of appealability ("COA"). Pursuant to 28 U.S.C. § 1254, "[c]ases in the courts of appeals may be reviewed by the Supreme Court" by several methods including certiorari. The Court determined that an application for a COA constituted a "case."

> There can be little doubt that Hohn's application for a certificate of appealability constitutes a case under § 1254(1). As we have noted, "[t]he words 'case' and 'cause' are constantly used as synonyms in statutes ..., each meaning a proceeding in court, a suit, or action." *Blyew v. United States*, 80 U.S. 581, 13 Wall. 581, 595, 20 L.Ed. 638 (1871). The dispute over Hohn's entitlement to a certificate falls within this definition. It is a proceeding seeking relief for an immediate and redressable injury, *i.e.*, wrongful detention in violation of the Constitution. There is adversity as well as the other requisite qualities of a "case" as the term is used in both Article III of the Constitution and the statute here under construction.

[11] By contrast, in each of the cases from other jurisdictions relied on by the State, there is no indication that anything but a notice of intent to file petition, motion for the appointment of counsel and/or request for stay of execution were filed prior to the filing of the petition. *See Isaacs v. Head*, 300 F.3d 1232, 1237 (11th Cir. 2002)(Georgia); *Gosier v. Welborn*, 175 F.3d 504, 506 (7th Cir. 1999), and *Holman v. Gilmore*, 126 F.3d 876, 879 (7th Cir. 1997)(Illinois); *Williams v. Cain*, 125 F.3d at 273 (Louisiana); *Williams v. Coyle*, 167 F.3d at 1037 (Ohio); *Moore v. Gibson*, 195 F.3d 1152, 1161 (10th Cir. 1999)(Oklahoma); *see also Nobles v. Johnson*, 127 F.3d 409, 412 (5th Cir. 1997)(Texas).

Hohn, 524 U.S. at 241.

The State contends that reliance on *Hohn* is misguided because it uses the term "case" in a significantly different context, and in particular that unlike the proceedings at issue here, an application for a COA relates to the merits of a habeas case. However, under the local rules, as noted above, the district court is required to review the Specification of Nonfrivolous Issues and make a determination that "nonfrivolous issues" are presented to issue a temporary stay of execution to permit the preparation and filing of a petition. This would seem to address the concerns of the cases relied on by the State which reject the notion that a motion for the appointment of counsel commences a habeas case under AEDPA because "it has no relation to the merits of a habeas petition . . . ." *Isaacs v. Head*, 300 F.3d at 1245; *see also Gosier v. Welborn*, 175 F.3d at 506; *Williams v. Coyle*, 167 F.3d at 1040.

In any event, this Court in *Hohn* rejected the distinction between a preliminary filing and a challenge to the merits in determining the meaning of a "case."

> In *Ex Parte Quirin*, 317 U.S. 1 (1942), we confronted the analogous question whether a request for leave to file a petition for writ of habeas corpus was a case in a district court....We held the request for leave constituted a case in the district court over which the court of appeals could assert jurisdiction, even though the district court had denied the request.

Hohn, 524 U.S. at 246. If, as in *Quirin*, a request for leave to file a habeas petition constitutes a "case," then a request that counsel be appointed for the purpose of filing a habeas petition must

also constitute a case.

In *Hohn*, rather than considering whether or not an application for a COA constitutes a threshold inquiry as opposed to a merits inquiry, the Court looked to whether the application for a COA constituted an adversary proceeding, *id.* at 241, and whether the decision on whether to grant or deny a COA was "judicial in nature" as opposed to merely being the product of an administrative function. *Id.* at 245.

Motions for appointment of counsel and for a stay of execution are adversary proceedings. In *McFarland*, this Court anticipated that motions for counsel and for stays would be contested, indicating that when such motions were denied they would be reviewed for abuse of discretion. *McFarland*, 512 U.S. at 858. Indeed, there have been cases in which rulings on such motions have been reviewed by appellate courts, indicating both the adversarial and judicial nature of the proceedings. *See, e.g., In re Parker*, 49 F.3d 204 (6th Cir. 1995)(district court granted *McFarland* stay; writ taken and appellate court reversed; rehearing and suggestion for rehearing en banc denied); *Cantu-tzin v. Johnson*, 162 F.3d 295 (5th Cir. 1998)(motion for appointment of counsel and for stay of execution denied by district court where petition would be time-barred; appellate court granted motion for appointment of counsel limited to litigating the limitations bar and denied motion for stay); *Gosier v. Welborn*, 175 F.3d at 506 (request for counsel was reviewed on appeal after the district judge dismissed the application).

Furthermore, as noted above, in Garceau's case, the State not only appeared, it filed and litigated a motion to vacate an extension of the stay of execution. *See Hohn*, 524 U.S. at 249 (Court concluded that there was adversity where "the Government entered an appearance in response to the initial application and filed a response opposing Hohn's petition for rehearing and

suggestion for rehearing en banc"). While a case does not lack adversity where an opposing party acquiesces in a particular matter that it could otherwise contest, *see Hohn*, 524 U.S. at 248 ("It would have made no difference had the Government declined to oppose Hohn's application for a certificate of appealability"), the fact that the State filed a motion to vacate the stay of execution in Garceau's case amply illustrates the adversarial nature of pre-petition procedures in California federal habeas proceedings.

Moreover, the district court's function in pre-petition proceedings in California is judicial in nature and does not consist of mere ministerial acts. Garceau's case exemplifies this fact. Both parties made appearances, submitted briefs, the district court denied the State's motion to vacate a stay of execution and made, at least implicitly, a finding that there were federal constitutional claims of sufficient merit to permit a further stay of execution pending the filing of a habeas corpus petition. These proceedings must be considered to have sufficient attributes to constitute a case.

In *Slack v. McDaniel*, 529 U.S. 473, this Court addressed whether AEDPA should apply to an appeal in which the COA was filed after AEDPA's enactment even though the district court proceedings were not subject to AEDPA. The Court reasoned that an application for a COA "initiates" proceedings in appellate courts, and commences an appellate case such that AEDPA would apply to appellate court proceedings filed after AEDPA's enactment. *Id.* at 481-482. Similarly, a request for counsel initiates proceedings in the district court and should be understood to commence a "case" for purposes of determining AEDPA's applicability in district court proceedings.

Moreover, the Specification of Nonfrivolous Issues filed in California federal district

courts is not unlike an application for the issuance of a COA in the appellate context. Both involve threshold determinations by the respective courts to ensure there are claims with sufficient merit for the case to go forward. *See* 28 U.S.C. § 2253(c)(2)(COA may issue only if "the applicant has made a substantial showing of the denial of a constitutional right."); L.R. 81-191(h)(3) (temporary stay of execution to permit preparation of the petition shall issue "unless no nonfrivolous issues are presented."). Thus, at minimum, the filing of a notice of colorable claims should be considered commencing a "case" in the district court in the way that the filing of a request for a COA commences a case in the appellate courts. *See Slack v. McDaniel*, 529 U.S. at 481-482.

The State argues that *Slack's* recognition that an appellate case may be subject to AEDPA even though the underlying district court case was not, supports its view that there is no requirement for a habeas case to be viewed as a unified whole. Pet. Brief, at 15-16. It follows, according to the State, that since a habeas proceeding can be divided into a district court "case" and an appellate "case," it could be further divided into a "pre-petition" case and a "petition" case. According to the State, it is only the case commenced by a "petition" that triggers the retroactivity provisions of AEDPA. This reductionist reasoning cannot possibly be what Congress intended when it used the phrase "case pending." Indeed, while Congress's creation of a gatekeeping provision in 28 U.S.C. § 2253, may have indicated a bifurcation between the district court case and the appeal, there is nothing that suggests that the district court "case" should be broken down any further.

The State's brief is devoid of any reasoned basis to conclude that the filing of a habeas petition is necessary for a case to be considered pending under AEDPA. Congress's use of the

phrase "case pending" in the wake of this Court's holding in *McFarland*, and the subsequent decisions in *Lindh*, *Hohn* and *Slack* make clear that when Garceau filed his motion seeking the appointment of counsel and a stay of execution – and when he obtained a further pre-petition stay by identifying colorable claims as required by the local habeas rules and by successfully opposing (both in writing and at a hearing) the State's motion to vacate the stay – his case was pending, and Chapter 153 of AEDPA does not apply to his habeas proceedings.

III.

A DETERMINATION OF THE MERITS OF GARCEAU'S UNDERLYING DUE PROCESS CLAIM UNDER AEDPA IS NOT FAIRLY INCLUDED OR COMPRISED WITHIN THE STATED QUESTION AND SHOULD BE ADDRESSED IN THE FIRST INSTANCE BY THE COURTS BELOW

This Court "disapprove[s] the practice of smuggling additional questions into the case after [it] grant[s] certiorari," *Irvine v. California*, 347 U.S. 128, 129 (1954), and has "consistently declined to consider issues not raised in the petition for a writ of certiorari." *Caspari v. Bohlen*, 510 U.S. 383, 388 (1994)(citing Supreme Court Rule 14.1(a)). As this Court explained, "[t]he Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart the system." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992). Thus, "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." Supreme Court Rule 14.1(a).

This Court granted review to address one question: when is a capital habeas case "pending" in federal court for purposes of determining whether Chapter 153 of AEDPA can be applied? As the State originally put it, "[t]his petition for certiorari asks this Court to resolve the

disagreement between the circuits as to the correct trigger event for determining the application of the AEDPA in capital cases." Cert. Pet., at 5. Resolution of this question, as discussed above, requires a determination of Congressional intent through the parsing of the statutory language and a review of this Court's precedent. It does not in any way depend on the underlying facts of Garceau's habeas claims. Nevertheless, the State's Brief on the Merits asks this Court for the first time to decide Garceau's claim that the instruction on criminal propensity given at trial violated due process and was prejudicial.

The State's effort to inject this additional question for the Court to consider is improper. Contrary to the State's suggestion, a merits determination of Garceau's due process claim is not fairly included or comprised within the above-stated question. Moreover, since this case was not litigated under AEDPA, the courts below have not had an opportunity to apply AEDPA's standard of review provisions to Garceau's claims in the first instance.[12]

While Rule 14.1(a) provides that "[t]he statement of any question presented will be deemed to comprise every subsidiary question fairly included therein," questions that are merely "related" or "complementary" to the question presented are "not fairly included therein." *Yee v. Escondido*, 503 U.S. 519, 537-538 (1992). Issues that are "analytically and factually" distinct, are not fairly included in the question presented. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 (1993)(per curiam).

In *Toyota Motor Manufacturing Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S. Ct. 681 (2002), this Court held that the Court of Appeals did not apply the proper standard in finding that

[12] For the same reasons, this Court should ignore the arguments of the amicus brief which also seek a resolution of the underlying due process claim. *See United States v. Dion*, 476 U.S. 734 (1986).

the respondent was disabled under the Americans with Disabilities Act of 1990. In holding that it was therefore inappropriate for the appellate court to have granted partial summary judgment for respondent, this Court declined to reinstate the district court's grant of summary judgment for petitioner because the petition for certiorari did not seek summary judgment and argued only that the appellate court's reasons for granting relief to respondent were unsound. *Id.*, 122 S. Ct. at 694. Similarly, the State in this case argued in its Petition for a Writ of Certiorari that the Court of Appeals should have decided Garceau's due process claim under AEDPA, but did not ask this Court to resolve that claim.

Indeed, such a question is "wholly divorced" from the question on which this Court granted review. *See Caspari v. Bohlen*, 510 U.S. at 389-390. While a determination as to whether AEDPA applies to Garceau's case may affect the resolution of Garceau's federal due process claim on which the court of appeal granted relief, the converse is certainly not true. The merits of Garceau's constitutional claims as they might be affected by AEDPA's scope of review are "analytically and factually" distinct from how AEDPA itself should be interpreted. His due process claim cannot reasonably be characterized as a subsidiary question subsumed within the State's statutory-construction Question Presented or as a question that must be answered as a predicate to the resolution of the Question Presented as to AEDPA's temporal reach. *See Caspari v. Bohlen*, 510 U.S. at 390; *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 381-382 (1995)(question regarded as embraced within the petition where it is "both prior to the clearly presented question and dependent upon many of the same factual inquiries").

While the State has led this Court to believe that adjudication of Garceau's due process claim under AEDPA is an issue which this Court can address simply, it is, in fact, a complex and

fact-laden inquiry for which the lower courts with greater familiarity with the trial and appellate record are better equipped. Moreover, as discussed above, neither the district court nor the appellate court applied AEDPA to Garceau's claims. Assuming this Court finds that AEDPA applies to Garceau's case, there is no reason why this case should not be remanded to the lower courts to review Garceau's claims under the standard of review set forth in AEDPA in the first instance after full briefing and careful examination of the trial record. *See Glover v. United States*, 531 U.S. 198 (2001); *United States v. Winstar Corporation*, 518 U.S. 839, 860 (1996).

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

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Respectfully submitted

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